

***United States Court of Appeals  
for the Second Circuit***

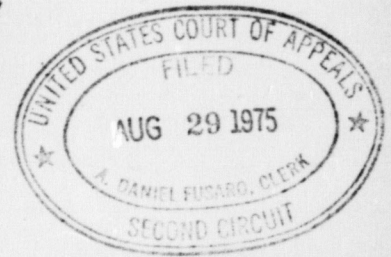


**APPELLANT'S  
REPLY BRIEF**



ORIGINAL

75-2051



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Number 75-2051

UNITED STATES OF AMERICA,

*Respondent,*

*—against—*

JOHN FRANZESE,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S REPLY BRIEF

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DEFENDANT-APPELLANT'S REPLY BRIEF

Appellant submits this reply brief to answer some of the contentions raised by the respondent in its brief.

POINT I

REPLYING TO RESPONDENT'S POINT I -  
CONCERNING THE DISTRICT COURT'S  
DENIAL OF APPELLANT'S MOTION FOR A  
NEW TRIAL AND IN THE ALTERNATIVE,  
AN EVIDENTIARY HEARING.

At the outset it is significant to note that the respondent has neither disputed nor challenged appellant's statement of law with regard to the standards for a new trial. As noted in appellant's brief (p. 23) there are two avenues by which the government is chargeable with suppression of evidence or the knowing use of perjured testimony. One is deliberate suppression or use, the other, which respondent has not tendered an answer, is knowledge imputed to the government by its ignoring evidence of such a high value that it could not have escaped its attention. United States v Kahn, 472 F.2d 272, 287 (2nd Cir., 1973) cert. den. 411 U.S. 982 (1973); U.S. v Rosner, 316 F.2d 269 (2nd Cir., 1975). Respondent did not answer appellant's assertion that the government could not have been unaware that Ann Massaneo had absolutely no connection with the robberies, that she never drove any getaway car and that the role given to her



at trial was in fact and reality played by Eleanor Cordero. Respondent has not offered any explanation why on the eve of trial Ann Massaneo was severed from the case with the government's consent and why on July 1, 1971 the indictment as to Ann Massaneo was dismissed with the consent of the government. Respondent has not disputed the fact that Ann Massaneo and Eleanor Cordero did not even resemble each other or the fact that Eleanor Cordero was never viewed by any witnesses. Respondent does not answer the vital question of how it was possible that the significant fact of who was the real participant in the robberies could have escaped its attention?

Mrs. Cordero states that at no time was she ever asked to deny her involvement in the robberies. This was despite the fact that originally a warrant was sworn out for her arrest, that she was arrested and that after her arrest she was in the company of the United States Attorney prosecuting the case on numerous occasions.<sup>\*/</sup> Appellant submits that the government cannot escape culpability by a studied avoidance of the truth.

The excision of Eleanor Cordero from the case is material to the defense in that it vitally concerns the motivation of John Cordero's cooperation with the government (Napue v Illinois, 360 U.S. 264 (1959); Miller v Pate, 386 U.S. 1 (1967)).

<sup>\*/</sup> The affidavit of Mr. Gillen which was submitted to the court below does not even purport to be based upon the personal knowledge and is rather equivocal.

As noted by this Court in U.S. v Franzese, 392 F.2d 954, 961 (1968) John Cordero at trial denied having stated that his wife had been the driver of one of the three switch-cars following the Oceanside bank robbery, although he stated his wife had "innocently participated in the robbery....". As respondent has noted (Resp. Brief p. 3) the case against appellant was built "almost entirely" upon the testimony of John Cordero, et al. Their credibility was thus the critical factor in the determination of appellant's guilt or innocence. Defense counsel, at trial, had little success in overcoming John Cordero's denials concerning his wife's role. The jury's estimate of the truthfulness and reliability of John Cordero was determinative of guilt or innocence and the role of his wife was a critical piece of evidence to the defense. (see, Giglio v United States, 405 U.S. 150, 154 (1972); U.S. v Seijo, \_\_\_\_ F.2d \_\_\_\_ (2nd Cir., April 23, 1975).

Respondent also contends that Mrs. Cordero's averments were mere generalities and her charges were not detailed or specific. (Resp. Brief, p. 16-18) This contention is totally unfounded. It has no basis in this record. Mrs. Cordero has presented to the court below minute details concerning the internal workings of the bank robbery ring. She explains how the robberies were planned, how they were executed, and how the proceeds were divided. Appellant cites the "Wilskers incident" (Appellant's Brief, p. 11-14, 21-22) as but one example in which



Mrs. Cordero conclusively shows that she and not Ann Massaneo was the female member of the bank robbery gang. Prior to Mrs. Cordero's revelations, submitted to the court below, the name Wilskers had never been revealed by anyone to the defense. The government had effectively kept the name out of the trial. The government in its answering papers in the court below conceded that in fact Wilskers was the correct location. Mrs. Cordero described exactly what happened at Wilskers. She was able to do so for the simple reason that she was there and an active participant in the events at Wilskers. Appellant submits that this establishes Mrs. Cordero's credibility to the utmost certainty.

The respondent's heavy reliance on Dalli v United States, 491 F.2d 758 (2nd Cir., 1974) is clearly misplaced and totally inapposite to the case at bar. The Dalli case was cited or quoted no less than four times by the respondent. A review of the facts in Dalli instantly reveals the marked differences between that case and the case at bar.

In Dalli the petitioner alleged that the evidence admitted in his trial was tainted by illegal wiretap activities of the New York State Police. The petition was based on the affidavits of one Charles Cassino, a New York State Police Lieutenant.

Prior to Dalli's trial, a full evidentiary hearing was held to determine whether Dalli's arrest and the heroin



found in his possession at the time of the arrest were the fruits of an allegedly illegal state wiretap. This was the identical issue raised in Dalli's petition. At the pre-trial hearing the Federal Government maintained and presented evidence to sustain its position that its investigation and arrest of Dalli were independent of any state investigation or wiretap. Cassino's affidavit which was the basis of the petition stated that "subsequent to May, 1969 I learned that it was common practice during the course of this investigation for Investigator Kaynor (The New York State Police) to take tapes representing the previous day's eavesdropping and together with John C. O'Brien of the Bureau of Narcotics and Dangerous Drugs, go to one of these rooms and there review the tapes." (491 F.2d 761)

The Court concluded that not only were these averments hearsay but hearsay singularly lacking in specificity, in that Cassino did not say how or from whom he learned this and that his testimony along those lines would have been inadmissible on a hearing on Dalli's petition. Comparing Cassino's averments to those of Eleanor Cordero it becomes readily apparent that appellant's petition for post-conviction relief was supported by a "sufficient affidavit" and that appellant was entitled, at the very least, to an evidentiary hearing.

All of Eleanor Cordero's statements were either based on personal knowledge (specific events which she participated in) or direct statements made to her by her husband.

Eleanor Cordero specifically detailed her role in the robberies, from the inception of the robberies, through her arrest, to, her and her husband's dealings with the United States Attorney. She states unequivocally that appellant had absolutely nothing to do with the robberies and that she was uniquely in a position to know the actual participants. She also states that she was informed directly by her husband that he had made a deal with the government by which she was to be cut out of the case, and one Ann Massaneo would be substituted in her place.

The District Court's denial of a hearing was clearly erroneous. Rather than granting appellant a hearing, required by statute, the court ~~ordered~~ that all evidence be offered in the form of affidavit or documents (A-53). Taylor v United States, 487 F.2d 307 (2nd Cir., 1973).

Contrary to respondent's assertion, at no time was the defense on notice of the essential facts required to enable them to interview Mrs. Cordero to take advantage of her testimony. Mrs. Cordero's actual role was always shrouded in a veil of secrecy and it was not until the submission of the papers in the court below that her actual role was ever known by the appellant or appellant's counsel. Moreover, the trial record was replete with offers of testimony, allowed into the record, that John Cordero held back the name of Sonny Franzese because of fear. Realistically speaking, if anyone on behalf of the Franzeses approached Mrs. Cordero during the trial, they would have laid



themselves open to an accusation of intimidating witnesses. The very act of reaching out to Mrs. Cordero (i.e., locating her address, contacting people who knew her, setting up an interview, etc.,) would have aroused Mrs. Cordero's fears and suspicions. It was hoped that the passage of time would create a more receptive atmosphere. <sup>\*/</sup>

#### POINT II

##### ANSWERING RESPONDENT'S POINT II - CONCERNING PREVIOUS DETERMINATION OF THIS MOTION ON ITS MERITS.

Respondent contends, without specifying just how, that the instant application was previously determined on its merits "by the jury at trial and the court on appeal...and on appellant Franzese's second new trial motion....". (Respondent's brief, p. 25) This argument is totally unfounded and has no basis in reason or reality. As noted in the papers to the court below, Mrs. Cordero's averments were not available to appellant until October, 1974, and prior to that time the extent of her true role in the numerous bank robberies was undisclosed and not available to appellant or his counsel.

No jury or Court has ever previously passed upon the merits of Mrs. Cordero's allegations. No Court or jury had been previously asked to determine whether Ann Massaneo

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\*/ It is interesting to note the reliance that respondent places upon the statement that Mrs. Cordero allegedly made to police in 1971, concerning meeting with Carmine Pepe. Apparently respondent has much faith in Mrs. Cordero's veracity.

became the alterego of Eleanor Cordero and that this metastasis was done with the connivance of the government.

CONCLUSION

The Court erred in denying Section 2255 relief, and applied erroneous and irrelevant legal procedures and standards in determining whether appellant should have been granted a new trial and whether appellant was entitled to an evidentiary hearing.

Respectfully submitted,

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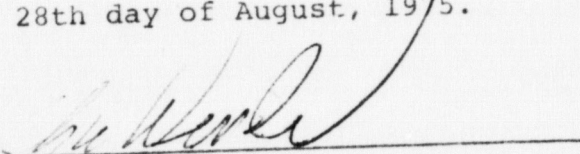
STATE OF NEW YORK     )  
                              : SS.:  
COUNTY OF QUEENS     )

Rose Ryan being sworn says: I am not a party to the action, am over 18 years of age and reside at 60-15 Calloway Street, Rego Park, New York 11368. I served a true copy of the annexed Defendant-Appellant's Reply Brief, in the following manner; on August 28, 1975:

By mailing the same in a sealed envelope, with postage thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

David G. Trager, Esq.  
Assistant U.S. Attorney  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

Sworn to before me this  
28th day of August, 1975.

  
\_\_\_\_\_  
CHARLES WENDER  
Notary Public, State of New York  
Qualified in Queens County  
Commission Expires August 30, 1976



